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**THE PHOTOGRAPHIC FILM AND PAPER MARKET IN JAPAN:
REPRESENTATIONS BY
THE GOVERNMENT OF JAPAN**

Beginning in 1995, the Office of the U.S. Trade Representative (USTR) conducted an investigation of market access barriers in the Japanese consumer photographic film and paper market and found that the Japanese Government established and tolerated an exclusionary market structure in the Japanese market that impedes foreign access. Following this investigation, USTR invoked the dispute settlement procedures of the World Trade Organization (WTO) to address the Japanese Government measures that have fostered this exclusionary market structure and impeded market access. USTR also called upon Japan to address the exclusionary business practices that may restrict market access for imported photographic film and paper.

In response to the U.S. complaint, the Government of Japan made numerous representations to the WTO dispute settlement panel about the openness of the Japanese market generally and this sector specifically. In addition, the Japan Fair Trade Commission (JFTC) conducted a survey of conditions of competition in the photographic film and paper sector, and issued a report summarizing the results of its survey. *The United States considers these representations, which are summarized below, to be commitments of the Government of Japan.*

I. Access to Japan's Distribution Channels

Japan's Distribution Policies. In the WTO panel proceeding, the United States expressed concerns about the role of the Government of Japan in closing Japanese distribution channels to foreign photographic materials. In particular, the United States expressed concerns that MITI helped direct and guide the consolidation of wholesale operations in the photographic sector, establishing narrow distribution channels under the control of domestic manufacturers. In response, the Government of Japan formally represented to the panel that MITI, for the past three decades, has pursued a policy of "distribution modernization" through the "rationalization" of transaction terms and "systemization" of the distribution system, which should "make the Japanese market more permeable by imports, not less."¹ According to the Japanese Government, "the aim of MITI's distribution policies . . . was not to block imports" and "[n]othing in MITI's distribution policies . . . did anything to encourage or facilitate the creation of an exclusionary market structure that discriminates against imported film or paper."² The Japanese Government also stated that "there is no government obstacle whatsoever that would prevent foreign manufacturers from improving their distribution systems in general, or developing relationships with film wholesalers or photofinishing labs in particular."³ The Japanese Government further stated, "distribution practices in the film industry have been closely scrutinized by the JFTC to guard against possible anticompetitive effects," and with respect to Japanese manufacturers' exclusionary relationships with certain wholesalers, Japan "has actively discouraged business practices that might tend to restrain independent primary wholesalers from purchasing from other suppliers."⁴ *Accordingly, the United States considers it to be a*

commitment of the Government of Japan that it will promote distribution policies that make the Japanese market more open to imports and take action against business practices that unreasonably restrain trade in distribution channels.

MITI Business Practices Guidelines. The Government of Japan also represented to the WTO panel that MITI's 1990 "Guidelines for Improving Business Practices" seek to promote modernization of the distribution sector, which the Government recognizes as "necessary for (among other things) improving imports' access to the Japanese market."⁵ The MITI Guidelines provide guidance to Japanese companies to revise the following business practices to increase transparency and to remove obstacles to international trade (among other stated reasons): rebates; returned goods; suggested retail price; dispatched workers; transaction conditions; services provided in the distribution sector; distribution *keiretsu*-nization; high-frequency, small-lot deliveries; and promoting of information systems.⁶ *Accordingly, the United States considers it to be a commitment of the Government of Japan that it will vigorously administer the 1990 MITI Guidelines to improve foreign access to the Japanese market.*

Financial and Other Assistance. The Government of Japan uses many types of financial and other assistance to promote its distribution policies. In the WTO panel proceeding, Japan represented that: companies in the photographic film and paper sector receiving financing from the Small-Medium Enterprise Agency (SMEA) "were free to choose the type and brand of equipment" purchased with SMEA loans and were available thereafter as customers to any supplier;⁷ and the Japan Development Bank (JDB) "does not evaluate applications from foreign enterprises or from enterprises that carry foreign products any differently than it evaluates applications from domestic enterprises."⁸ The Government of Japan further represented to the WTO panel that "JDB loans and SMEA financing do not distinguish between businesses that sell domestic products and those that sell imported products."⁹ *Accordingly, the United States considers it to be a commitment of the Government of Japan that it will provide foreign firms, foreign-affiliated firms, and domestic firms handling imports, with access to SMEA and JDB assistance on a national treatment basis, and that it will not use this assistance to protect domestic production.*

Economic Structural Reform Measures. The 1995 Business Reform Law authorizes the Japanese Government to implement economic structural reform by providing a broad range of assistance to businesses that are part of a designated industry, including: preferential financing; tax incentives; detailed information on domestic and foreign businesses; and potential exemptions from the Antimonopoly Law. In the WTO panel proceeding, the Government of Japan represented that the Business Reform Law "treats foreign-affiliated firms and domestic ones on an equal basis," and that, as of April 1, 1997, the photosensitive materials retailing sector was no longer eligible to request assistance under the Business Reform Law.¹⁰ *Accordingly, the United States considers it to be a commitment of the Government of Japan that it will apply the Business Reform Law on a national treatment basis, and that it will not use the law to protect domestic production.*

II. Access to Large Retail Outlets

Large Stores Law. In the WTO panel proceeding, the United States expressed its concern that the Large Stores Law limits the expansion and operation of large stores and thereby restricts an important sales channel for foreign firms. The United States also provided specific examples of local retailers who required large store planners to engage in competition-restricting negotiations with local retailers before these planners could formally initiate the Large Store Law process to open or expand a large store. The U.S. concerns were echoed in a 1995 JFTC advisory council report, which found that informal negotiations were being conducted between firms or with trade associations, including under the Large Stores Law, and that such negotiations could raise problems under the Antimonopoly Law.¹¹ In response, the Government of Japan represented to the panel that it applies “only objective criteria to determine the need for an adjustment” under the Large Stores Law and makes significant efforts to ensure that “local regulations are not excessive or inconsistent” with the Large Stores Law.¹²

More specifically, the Government of Japan represented to the WTO panel that the Large Stores Law: does not require any type of negotiation or consultations -- including “prior explanations” -- between large store openers and local retailers; does not allow opportunities for local retailers to “extract concessions;” and does not require or recommend payments to local business associations.”¹³ The Government of Japan also represented to the panel that it “has made clear that none of the MITI branch offices, prefectural governments, or other local governments may either require or recommend that store openers provide prior explanations to or consult with local retailers,” that it “actually has corrected and is prepared to correct any such practice upon discovery,” and that any guidance encouraging any of these practices would be “contrary to the official policy of the Government of Japan.”¹⁴ *Accordingly, the United States considers it to be a commitment of the Government of Japan that it will: use only objective criteria to regulate large stores; ensure that national, prefectural, and local measures -- whether formal or informal -- are neither excessive nor inconsistent with the Large Stores Law; and take action necessary -- including the application of the Antimonopoly Law -- to prevent local retailers or trade associations from requiring negotiations, consultations, or explanations, extracting concessions or payments, or engaging in other competition-restricting adjustments from existing or prospective large stores.*

Repeal of Large Stores Law. MITI’s advisory council published an interim report in December 1997 recommending, in effect, that the Government of Japan repeal the Large Stores Law.¹⁵ The United States welcomes this recommendation and urges the Government of Japan to repeal this law. *The United States expects the Government of Japan to ensure that no national, prefectural, or local authority replaces the Large Stores Law with: (1) informal measures; or (2) formal measures that unreasonably restrict competition in the distribution and retail sectors on a de jure or de facto basis.*

III. Applicability of Promotions Measures and Enforcement of Competition Policies

Premiums Law. In the WTO panel proceeding, the United States expressed its concern that the Government of Japan maintained unduly restrictive measures against legitimate sales promotions pursuant to the Premiums and Misrepresentations Law (Premiums Law), which is administered by the JFTC. In response, the Government of Japan represented to the panel that “American business has been able to compete freely, subject to no restriction whatsoever under the Premiums law, in pricing and quality. . . .”¹⁶ The Government of Japan further represented that neither “the Antimonopoly Law and the Premiums Law . . . [nor] their implementation . . . restrict low price offers of photographic film and paper. . . .”¹⁷

The United States also expressed its concern that sector-specific fair competition codes and the delegation of authority to fair trade councils to enforce those codes further restricted legitimate sales promotions in the Japanese market. In response, the Government of Japan represented to the WTO panel that “there is no Fair Competition Code covering film products” and that the JFTC “has no intention to allow application of the [Retailers’] Code to film or paper.”¹⁸ The Government of Japan further represented that fair competition codes “are autonomous rules and cannot bind outsiders” and “do not mean that the JFTC’s authority has been delegated to these bodies [the fair trade councils].”¹⁹

Accordingly, the United States considers it to be a commitment of the Government of Japan that it will not administer the Premiums Law so as to restrict retail price competition. The United States further considers it to be a commitment of the Government of Japan that it will ensure that the fair competition codes are not applied to photographic film and paper products, and that the fair trade councils do not threaten or take enforcement actions against non-members.

Fair Trade Promotion Council. In the WTO panel proceeding, the United States expressed its concern that the Fair Trade Promotion Council (Promotion Council), which is comprised of all the photographic materials industry associations and was established to develop and enforce self-regulating measures governing dispatched employees and promotional contributions to retailers by council members, was enforcing its own industry codes. The Government of Japan represented that the Promotion Council “is entirely a private-sector organization.”²⁰ *Accordingly, the United States considers it to be a commitment of the Government of Japan that it will ensure that the Fair Trade Promotion Council does not have or represent itself as having any official capacity or relationship to the JFTC.*

Antimonopoly Law Distribution Guidelines. The Government of Japan also represented to the WTO panel that the JFTC “has taken a series of measures, such as economic surveys and reports, the formulation of ‘Distribution Guidelines,’ the establishment of a special task force, as well as enforcement actions, in order to eliminate impediment [sic] to the market access of foreign products.”²¹ The JFTC Distribution Guidelines describe specific type of business practices that may impede free and fair competition and violate the Antimonopoly Law, including boycotts, refusals to deal, price restraints, and certain other vertical non-price restraints.²² *Accordingly, the*

United States considers it to be a commitment of the Government of Japan that it will vigorously administer the JFTC Distribution Guidelines as part of its efforts to enforce the Antimonopoly Law against business practices that unreasonably restrict competition or market access for foreign photographic film and paper.

Monitoring the Photographic Film and Paper Industry. The Government of Japan represented to the WTO panel that the JFTC “has been actively scrutinizing the film industry to prevent domination of distribution channels by manufacturers.”²³ In 1996, the JFTC initiated a survey of the Japanese photographic film and paper sector based on concerns raised by the United States. In its findings, issued in July 1997, the JFTC reiterated its formal determination under the Antimonopoly Law that the Japanese photographic film and paper industry is “highly concentrated with a high degree of oligopoly” and is in a “monopolistic state,” which makes the dominant Japanese manufacturer subject to special scrutiny under the Antimonopoly Law.²⁴ The JFTC further determined that Fuji Photo Film, Inc. (Fujifilm) is “an extremely influential business” in the color film and color paper manufacturing fields and that such a business “would more likely be in a position more likely to cause problems under the Antimonopoly Law” than other businesses.²⁵ For example, with extremely influential firms, the risks are higher that: “such non-explicit acts as ‘suggestion’ or ‘hinting’ to other parties might cause competition-restricting effects;” or an act which is not unlawful in itself or at present might cause “competition restricting effects . . . when combined with the effects of other acts . . . [or] when accompanied by changes in the market environment at a later stage.”²⁶

Thus, the JFTC Survey noted that “it is important from the viewpoint of competition policy to point out such acts which may be considered to risk future violations of the Antimonopoly Law, taking into account changes to the market situation and the influence on the market of the acts, and to prevent such developments from taking place.”²⁷ In this regard, the JFTC highlighted certain concerns regarding Fujifilm’s business practices in the Japanese market, including that Fujifilm:

- has a *de facto* exclusive relationship with seven primary wholesalers in the Japanese photographic film and paper industry;²⁸
- maintains two progressive rebate schemes targeted at the primary photographic wholesalers;²⁹
- imposes a “guarantee deposit system” on primary wholesalers under which Fujifilm deducts a uniform percentage of the wholesalers’ anticipated film sales for each fiscal year from the semiannual rebates Fujifilm pays to the wholesalers for sales in the previous period;³⁰ and
- pays the “sales promotion expenses” of its primary photographic wholesalers to support sales made to “influential stores” that purchase large quantities of film and possess strong price negotiating power.³¹

Moreover, the JFTC issued additional guidance to Fujifilm, the primary photographic wholesalers, and photographic materials trade associations so as to minimize the risk that their business activities would cause future problems under the Antimonopoly Law.³² For example:

- Fujifilm has conveyed complaints about low-price sales from retailers to the wholesalers serving the low-price sellers thereby causing some wholesalers to feel pressured to take some steps to prevent their retail customers from conducting low-price sales. The JFTC advised Fujifilm to refrain from such activity in the future.³³
- Primary photographic film wholesalers, which handle only Fuji products, may be engaging in concerted business activities or restrictions on price or the activities of their customers. The JFTC stated that it will continue to monitor carefully this situation.³⁴
- Japanese wholesalers supply film to tourist sites in Japan, establishing a *de facto* exclusive sales relationship, and ask trade associations and manufacturers to enforce these “rights.” The JFTC noted that activities that served to maintain or enforce this system would raise problems under the Antimonopoly Law.³⁵
- Some distributors were concealing sales to new types of film outlets and lab operations, such as camera- and general-mass merchandisers, that offer low price film sales and developing and processing (DP) to avoid complaints from the largest association of photo specialty stores and its members, and that one regional “photography association” was suspected of fixing DP prices. The JFTC advised the association of photo specialty stores and its members not to oppose new types of business activities and issued a warning to the regional association regarding fixing of DP prices.³⁶

The JFTC survey reported that firms sometimes were selling or leasing minilabs at below-cost prices and that they were sometimes tying these sales to the purchase of photofinishing supplies. It noted that photographic paper manufacturers which did not manufacture minilab equipment or had only limited sales networks for their minilab equipment, could lose their opportunity to sell photographic color paper if such activities are pervasive.³⁷

Accordingly, the United States considers it to be a commitment of the Government of Japan that it will: actively seek to prevent Fujifilm from abusing its position as an extremely influential firm in the Japanese photographic film and paper market; give guidance to Fujifilm, photographic materials wholesalers, and photographic materials associations for the purpose of promoting competition and the transparency of business practices in the Japanese color film and photographic paper market and monitor their progress with regard to this guidance; enforce the Antimonopoly Law to prevent Fujifilm, photographic materials wholesalers, and photographic materials trade associations from fixing film, photofinishing, and photographic paper prices; and ensure that Fujifilm does not unreasonably restrict market access or distribution channels in the sale and leasing of minilab equipment or photofinishing supplies.

IV. Consistency of Other Existing, Enhanced, or New Measures With Government Policies

The Government of Japan represented to the WTO panel that: MITI's distribution policies "had nothing to do with encouraging vertical integration of distribution channels by manufacturers, . . . much less with doing so to block imports;" the Large Stores Law "does not adversely affect the competitive conditions for imported film or paper;" and that the Premiums Law "does not prevent normal price, quality, or promotional competition, and it does not disadvantage imports;" and that it "has actively discouraged business practices that might tend to restrain independent primary wholesalers from purchasing from other suppliers."³⁸ *Accordingly, the United States expects that the Government of Japan will maintain its stated policies and will not apply or enhance existing measures or introduce new measures with the intent or effect of unreasonably restricting market access or affording protection to the Japanese photographic film and paper sector. The United States expects Japan to implement, monitor, and enforce its stated policies for existing, enhanced, or new measures, including but not limited to:*

MITI Business Practice Guidelines. On December 15, 1997, MITI issued a report surveying business practices currently in the Japanese wholesale sector and indicated that MITI may issue another set of guidelines, similar to the 1990 MITI Guidelines, describing MITI's recommended business practices.³⁹

Financial and Other Assistance. In addition to the financial assistance provided by SMEA and the JDB, the Government of Japan uses other organizations to implement MITI's distribution programs by preparing manuals and providing training and managerial support for Japanese distributors and manufacturers undertaking distribution functions. Assistance also may be available to the Japanese photographic film and paper sector through the Distribution Systems Development Center as well as under other Japanese Government measures such as the Law to Promote Efficiency of Distribution Operation for Small- and Medium-Sized Enterprises; the Outline of Comprehensive Measures for Physical Distribution; the Law to Improve Districts Designated for Distribution Operation; the Small- and Medium-Sized Retail Commerce Industry Promotion Law; and the Specified Shopping Plaza Improvement Law.

Economic Structural Reform Measures. In addition to the 1995 Business Reform Law, the Government of Japan has in place a number of other measures to achieve broad economic structural reform, including: the 1997 Action Program for Reform and Innovation of the Economic Structure; the 1997 Emergency Economic Measures for the 21st Century; and the 1998 Special Budget for Economic Structural Reform Through the Promotion of Efficiency of Physical Distribution.

V. Monitoring and Follow-up

In order to improve market access for foreign firms in the Japanese photographic film and paper sector, the United States will establish an interagency monitoring and enforcement committee to review whether Japan's implementation of the measures described in this document is consistent with its representations. The committee will be co-chaired by USTR and the Department of Commerce, with participation of officials from the Departments of State, Justice, and Treasury, as well as other relevant agencies of the U.S. Government. In addition, the U.S. Embassy in Tokyo will designate a contact number to receive information regarding the measures

covered in this document and will relay this information to the committee on a regular basis. The committee also will seek information from the photographic film and paper industry and other industries.

As part of its monitoring and enforcement efforts, the committee will collect information and data on a regular basis to review whether Japan is fully implementing these measures consistent with its representations. This review will be based on all relevant information, including but not limited to: (1) information on actions taken by Japan regarding the specific representations it has made, including implementation, monitoring, and enforcement activities by MITI and the JFTC; and (2) data, including the availability of foreign brands in distribution channels in Japan, and the number and type of retail stores in Japan carrying photographic products, and the availability, by volume, of foreign brands in these outlets.

The committee will conduct its review and report on the review results semi-annually. The first review will be completed in July 1998.

Notes

- ¹ Japan First Submission at ¶¶ 114, 116, 138, 145, 151, and 215. All cites to Japan's submissions are to the public versions.
- ² Japan First Submission at ¶ 107.
- ³ Japan First Submission at ¶ 39.
- ⁴ Japan First Submission at ¶¶ 227 and 75, footnote 29.
- ⁵ Japan First Submission at ¶¶ 145 and 148.
- ⁶ Japan First Submission at ¶ 147; 1990 MITI Guidelines at 2-10.
- ⁷ Japan First Submission at ¶ 223.
- ⁸ Japan First Submission at ¶ 220.
- ⁹ Japan First Submission at ¶ 701.
- ¹⁰ Japan First Submission at ¶ 562, footnote 486.
- ¹¹ JFTC's Government Regulation and Competition Policy Research Council, *Concerning the Reevaluation of Government Regulation in the Distribution Sector* (June 1995) at 7-9.
- ¹² Japan First Submission at ¶ 322 and 328.
- ¹³ Japan First Submission at ¶¶ 324, 326, and 329, footnote 343; Japan Second Submission at ¶ 176. *See also*, JFTC, *Concerning the Reevaluation of Government Regulations in the Distribution Sector* (June 1995) at 16 (discussing payments to local business associations, *i.e.*, "cooperation money").
- ¹⁴ Japan Second Submission at ¶ 176; Japan First Submission at ¶ 745.
- ¹⁵ Interim Report of the Joint Session of the Industrial Structure Council Distribution Committee and Small Medium Enterprise Policy Council Distribution Subcommittee, at 4, 6-8.
- ¹⁶ Japan First Submission at ¶ 355.
- ¹⁷ Japan First Submission at ¶ 354.
- ¹⁸ Japan First Submission at ¶¶ 736 and 466.
- ¹⁹ Japan First Submission at ¶¶ 472 and 468.
- ²⁰ Japan First Submission at ¶¶ 364 and 579.
- ²¹ Japan First Submission at ¶ 368.
- ²² JFTC Distribution Guidelines at Parts I and II.
- ²³ Japan First Submission at ¶ 232 (emphasis in original).
- ²⁴ JFTC Survey at 1.
- ²⁵ JFTC Survey at 80-81; JFTC Survey Summary at 11-12..
- ²⁶ JFTC Survey at 80.
- ²⁷ JFTC Survey at 81.
- ²⁸ JFTC Survey at 81.
- ²⁹ JFTC Survey at 82.
- ³⁰ JFTC Survey at 82-83.
- ³¹ JFTC Survey at 84.
- ³² JFTC Survey Summary at 20; JFTC Survey at 97.
- ³³ JFTC Survey at 85.
- ³⁴ JFTC Survey at 86.
- ³⁵ JFTC Survey at 94.
- ³⁶ JFTC Survey at 96-97.
- ³⁷ JFTC Survey at 90.
- ³⁸ Japan First Submission at ¶¶ 4 and 75, footnote 29.
- ³⁹ *Oroshiurigyo No Genjo To Kadai*, Wholesale Industry -Current Status and Future Issues, Small Medium Enterprise Agency, December 15, 1997 at 99.